No. 77-1576

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN VAL BROWNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
DEBORAH WATSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1576

JOHN VAL BROWNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 572 F. 2d 720. The opinion and order of the district court (Pet. App. 19a-25a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1978. A petition for rehearing was

denied on April 5, 1978. The petition for a writ of certiorari was filed on May 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an investigation by the Customs Service into the importation practices of petitioner's company was a "proceeding" within the meaning of 18 U.S.C. 1505.

2. Whether communications between accomplices may violate 18 U.S.C. 1505.

3. Whether the court of appeals lacked jurisdiction to consider the government's appeal.

STATEMENT

In March 1976, a grand jury in the Eastern District of Missouri returned a three-court indictment (Pet. App. 27a-42a) charging petitioner, and defendants Browning Arms Company and Browning, Inc., with corruptly endeavoring to influence, obstruct, and impede the administration of customs laws, in violation of 18 U.S.C. 1505 (Counts I and II), and with introducing imported merchandise into the commerce of the United States by means of false statements and invoices, in violation of 18 U.S.C. 542 (Count III). Shortly thereafter, the case was transferred to the District of Utah. On August 16, 1976, the United States District Court for the District of Utah entered an oral order dismissing the indictment; on September 14, 1976, it issued a written order to

the same effect (Pet. App. 19a-25a). The government appealed, and the court of appeals reversed and reinstated the indictment (Pet. App. 1a-14a).

The indictment described the relationship between the Browning Arms Company and two foreign manufacturing companies, Fabrique Nationale d'Armes de Guerre S.A., of Liege, Belgium (FN), and Miroku Firearms Manufacturing Company of Tokyo, Japan, both sellers of weapons to Browning Arms. It alleged that petitioner persuaded both FN and Miroku to falsify the unit price of certain .22 caliber rifles on Special Customs Invoices in order to avoid the higher duties imposed on such rifles with a unit price and value of $25.00 or more.[1] FN and Miroku agreed to list the unit price of the rifles sold to Browning Arms at an amount just below $25.00. Browning Arms then paid its suppliers the difference between the price listed on the Customs Invoice and the actual price of the rifles. These separate payments were not disclosed to the Customs Service. Under these arrangements, Browning Arms imported approximately 64,700 rifles from FN in approximately 157 separate entries between 1965 and 1970; the company imported approximately 47,000 rifles from Miroku in approximately 42 separate entries between 1969 and 1972 (Pet. App. 37a).

---

[1] Petitioner was president and chief executive officer of Browning Arms Company, Inc. In 1972, the company changed its name to Browning, Inc., and transferred the name Browning Arms Company to a subsidiary. Petitioner became president and chief executive officer of Browning, Inc., and also served as a director of Browning Arms (Pet. App. 28a).

During the period 1970-1975, the United States Customs Service conducted an investigation of the importation practices of Browning Arms Company. Count I of the indictment alleged that in the course of this investigation petitioner counselled FN to conceal the undisclosed payments and to give misleading, incomplete, and manufactured information in response to Customs Service inquiries. Count II alleged that petitioner had engaged in similar conduct with respect to Miroku. Finally, Count III charged petitioner and his corporate co-defendants with 26 separate instances of willfully introducing imported merchandise into the United States by means of false and fraudulent documents. This charge was based on the Customs entry forms executed by Browning Arms Company in connection with each shipment of .22 caliber rifles from FN or Miroku. The entry forms falsely affirmed the accuracy of the Special Customs Invoices filed by the weapons suppliers.

ARGUMENT

1. Even if petitioner's claim would otherwise merit review, this Court should not now consider his challenges to the court of appeals' reinstatement of the indictment. The ruling below places petitioner in precisely the same procedural position he would have occupied if the district court had denied his motion to dismiss. Such a denial would not have been subject to pretrial appeal. See *Cogen* v. *United States*, 278 U.S. 221; *Cobbledick* v. *United States*, 309 U.S.

323; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327. The same considerations that counsel against interlocutory appeals of denials of motions to dismiss weigh against interlocutory review by this Court of the issues now presented by petitioner. Petitioner was indicted more than two years ago and has not yet been tried. At trial, petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court when seeking review of the final judgment.

2. Petitioner contends (Pet. 12-18) that his advice to foreign manufacturers to give false and misleading information to customs officials did not violate 18 U.S.C. 1505, because the customs investigation in this case was not a "proceeding" pending before a government agency, as required by Section 1505. As the court of appeals correctly held (Pet. App. 5a-10a), this claim is without merit.

Section 1505 prohibits the conduct of persons who "corruptly * * * endeavor[] to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States * * *." The statute also provides for punishment of those who corruptly endeavor "to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States

* * *." Petitioner argues that because no formal event, such as the filing of a complaint or the issuance of a subpoena, marked the beginning of the customs investigation in this case, that investigation was not a "proceeding" within the meaning of Section 1505.

After a review of the relevant authorities, the court of appeals properly concluded (Pet. App. 9a) that

> the term "proceeding" is not * * * limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a nonproceeding simply because it is preliminary to indictment and trial.

This construction of the statute fully accords with the results reached by other federal courts, and further review by this Court is not warranted. In *United States* v. *Fruchtman*, 421 F. 2d 1019, 1021 (C.A. 6), certiorari denied, 400 U.S. 849, for example, the court of appeals held that " 'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency." Likewise, in *Rice* v. *United States*, 356 F. 2d 709, 712 (C.A. 8), the court of appeals construed the term "proceeding" as used in Section 1505 to mean simply

"proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion." In the Eighth Circuit's view, as in the opinion of the court of appeals in this case, "Congress did not limit the term 'proceeding' as used in § 1505 to only those acts committed after a formal stage was reached * * *" (356 F. 2d at 712). See also *United States* v. *Vixie*, 532 F. 2d 1277 (C.A. 9); *United States* v. *Batten*, 226 F. Supp. 492 (D. D.C.), certiorari denied, 380 U.S. 912.

Notwithstanding these precedents,[2] petitioner argues that the passage of 18 U.S.C. 1510 in 1967 re-

---

[2] Petitioner attempts to distinguish *Fruchtman* and *Rice* on the ground that in *Fruchtman* a formal complaint had been filed with the Federal Trade Commission, and in *Rice* preliminary charges had been filed with the National Labor Relations Board at the time of the alleged violations of Section 1505. The court of appeals' opinion in *Fruchtman*, however, makes no mention of the filing of a complaint and refers only to an informal investigation by the Commission. Petitioner accurately observes that informal charges had been filed with the Board at the time of the alleged Section 1505 violations at issue in *Rice*. Indeed, the basis for the criminal charges against the defendants in that case was that they had used force and threats of force in order to compel certain union members to withdraw the charges they had filed. But the fact remains that the court stressed that the lack of a formal complaint by the Board's general counsel was not dispositive because the term "proceeding" should be interpreted broadly according to its dictionary definition and its usage in common parlance.

Under the statutory scheme relevant here, persons importing merchandise from abroad must file sworn Customs Entry

flects a congressional determination that agency action not instituted by formal process, such as the customs investigation here in dispute, is not covered by the term "proceeding" in Section 1505. Section 1510 makes criminal any willful endeavor "by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." Petitioner contends that only Section 1510 applies to investigations occurring before the initiation of formal proceedings and that the conduct alleged here was not criminal because he did not seek "by means of bribery, misrepresentation, intimidation, or force or threats thereof" to influence the statements of the foreign weapons suppliers.[3]

---

forms attesting to the accuracy of the description and price of the goods as stated in the shipping invoice. See 19 U.S.C. 1485. Customs officials, usually relying in large measure on the information provided in the invoices and entry forms, then appraise the imported merchandise (see 19 U.S.C. 1500) and collect the duty owed (see 19 U.S.C. 1505). In 1970, Congress amended the statutory provisions governing the appraisal and collection process. These amendments are contained in Title II of the Customs Administrative Act of 1970, 84 Stat. 282-283, and Title II is labelled "Administrative Proceedings in Customs Matters." As a matter of both common usage and legislative characterization, therefore, the Customs Service's collection efforts, including the attendant investigations into the accuracy of values and prices reported by importers and suppliers, are properly termed "proceedings."

[3] By contrast to Section 1510, Section 1505 punishes any person who "*corruptly* * * * endeavors to influence, obstruct,

Petitioner misconceives the purpose of Section 1510. In enacting that provision, Congress addressed itself solely to problems encountered in criminal investigations that have not yet ripened into judicial proceedings. Section 1503 and the first paragraph of Section 1505 impose criminal penalties on persons who corruptly endeavor to influence witnesses in judicial, administrative, or congressional proceedings. Before the passage of Section 1510, attempts to obstruct criminal investigations by threatening potential witnesses into silence before the initiation of a judicial proceeding escaped criminal sanction. The difficulties were especially acute in the area of organized crime and racketeering. Congress therefore enacted Section 1510 in order to provide protection for witnesses who cooperate with federal law enforcement officials before a prosecution is formally commenced. See S. Rep. No. 307, 90th Cong., 1st Sess. 1-4, 6 (1967); H.R. Rep. No. 658, 90th Cong., 1st Sess. 1-3 (1967).

As the court of appeals correctly concluded (Pet. App. 7a), this legislative history "does not serve to give any significant clarification to the meaning of 'proceeding' " in the fourth paragraph of Section 1505, which petitioner allegedly violated. The federal courts have consistently construed the term "proceeding" to

---

or impede the due and proper administration of the law" in an agency proceeding (emphasis added). The court of appeals correctly rejected petitioner's argument that his alleged behavior did not constitute a "corrupt" effort to obstruct the due and proper administration of the law (Pet. App. 10a), and petitioner does not pursue that argument here.

include the civil investigative activities of federal agencies, whether or not initiated by formal process. In the absence of evidence that Congress intended to define the word more restrictively, courts may properly refer to common usage and dictionary definitions in determining the meaning of "proceeding" in Section 1505. By embracing civil investigations of the kind involved here, the interpretation adopted by the court of appeals and other federal courts serves to advance the purpose of the statute. "In light of the scope of the congressional purpose," the statute should not be given "an unnaturally narrow reading * * *." *United States* v. *Nardello*, 393 U.S. 286, 296.

3. Relying on *United States* v. *Cameron*, 460 F. 2d 1394 (C.A. 5), petitioner claims (Pet. 18-19) that his indictment was properly dismissed, because a person cannot violate Section 1505 by communicating with an alleged accomplice and urging that person to withhold information from law enforcement officials. *Cameron* is inapposite.

Cameron involved a prosecution under Section 1510. The defendant, an attorney, received as a retainer money he knew had been stolen in a bank robbery. The mother of one of the participants in the robbery gave the money to an associate in the defendant's legal practice in an effort to obtain representation for her son. The associate forwarded the money to the defendant and then cooperated in the defendant's efforts to conceal the location of the money from federal investigators. The poorly drawn second count of a

two-count indictment charged defendant with an offense under Section 1510.[4] The government alleged that defendant and his legal associate had endeavored, by means of a misrepresentation, to cause the associate to make false statements to an agent of the Federal Bureau of Investigation (see 460 F. 2d at 1396 n. 3). As the court of appeals recognized (*id.* at 1401-1402), this charge was faulty, reciting as it did that both defendant and his associate sought to prevent the associate from making truthful statements to the FBI. Rejecting the possibility that the associate could have been his own victim, the court of appeals reversed. The court noted that the only apparent misrepresentation was the one the associate had made to the FBI; the government produced no evidence that the associate had been induced to provide false information through a misrepresentation made to him by the defendant (*id.* at 1402).

Here, by contrast, petitioner was indicted under Section 1505 rather than Section 1510. As the legislative history recounted above demonstrates, Section 1510 deals solely with efforts to obstruct the communications of information to criminal investigators by potential witnesses. Section 1505, on the other hand, proscribes not only corrupt efforts to influence a witness in an agency proceeding but also all corrupt attempts to obstruct the due and proper administra-

---

[4] The first count of the indictment charged the defendant with violating 18 U.S.C. 2113(c) by receiving and concealing money, knowing the same to have been unlawfully taken from a bank.

tion of the law in such a proceeding. Accordingly, even had FN and Miroku been named as co-defendants or unindicted accomplices, petitioner's conduct in counselling them to give fraudulent answers to Customs Service officials would have violated Section 1505. See *Stein* v. *United States*, 337 F. 2d 14 (C.A. 9), certiorari denied, 380 U.S. 907; *United States* v. *Abrams*, 427 F. 2d 86 (C.A. 2), certiorari denied, 400 U.S. 832. Moreover, unlike the defendant's legal associate in *Cameron*, FN and Miroku were *not* named as accomplices in the indictment, and therefore the charges against petitioner could not have involved any of the logical problems discerned by the *Cameron* court.

4. Finally petitioner asserts (Pet. 19-21) that the court of appeals lacked jurisdiction to consider the government's appeal because the appeal was not taken from a final order in the district court. This argument is groundless.

The district court orally granted defendants' motions to dismiss on August 16, 1976 (II Tr. 53).[5] Counsel for the defendant corporations requested time to prepare a proposed written order that would clearly state the grounds for the dismissal. The district court granted defense counsel ten days in which to submit such a proposal and government counsel ten days following the submission to file objections (II Tr. 54-55).

[5] "II Tr." refers to Volume II of the transcript of the district court proceedings, dated August 16, 1976.

Later the same day, a docket entry was made stating that the motions to dismiss had been granted as to each defendant and that motions for discovery and for a bill of particulars had been rendered moot by the court's ruling.[6] The docket entry also stated the time limits within which counsel were to submit a proposed written order and objections thereto. Thereafter, on September 14, 1976, the district court entered a written order dismissing the indictment; notice of this order was mailed on September 16, and received by the government on September 20. Notice was thus mailed and received more than 30 days after the August 16 oral order granting the defense motions to dismiss the indictment (Government's Reply to Appellees' Motion to Dismiss, Appendix 1).

On September 15, in order to preserve the government's right to appeal, government counsel filed a notice of appeal from the August 16 order. The government did not file an additional notice of appeal after receiving the district court's September 14 order. However, on September 27, the government filed with the district court a designation of the record on appeal which included reference to the court's written order of September 14 (Government's Reply to Ap-

[6] Rule 4(b), Fed. R. App. P., provides in pertinent part:

> * * * When an appeal by the government [in a criminal case] is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

pellees' Motion to Dismiss, Appendix 2). In addition, the government filed with the court of appeals a docketing statement which indicated that the government was appealing from the district court's September 14 order (Government's Reply to Appellees' Motion to Dismiss, Appendix 3).

In light of these facts, it would exalt form over substance to hold that the court of appeals lacked jurisdiction simply because the government, in its September 15 notice of appeal, stated that it was appealing the district court's order of August 16 rather than the written order of September 14. This Court consistently has held that defects of such a technical nature should be disregarded. *Hoiness* v. *United States*, 335 U.S. 297, 300; see also *Foman* v. *Davis*, 371 U.S. 178; *Lemke* v. *United States*, 346 U.S. 325. The government's notice of appeal in the instant case, the designation of the record, and the docketing statement clearly disclosed to the court of appeals and to the parties involved the government's intention to appeal the dismissal of the indictment. This was sufficient to perfect an appeal in the circumstances presented.[7] See, *e.g.*, *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F. 2d 53 (C.A. 2); *Jones* v. *Nelson*, 484 F. 2d 1165 (C.A. 10); *Jones* v. *Chaney and James Construction Co.*, 399 F. 2d 84 (C.A. 5).

---

[7] The cases cited by petitioner (Pet. 20) do not support his position. In those cases, either *no* appeal was taken within the jurisdictional time limit, or the appeal was taken from an order clearly interlocutory in nature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
DEBORAH WATSON,
Attorneys.

JULY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269068 64